



## **Arizona Medical Board**

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### **DRAFT MINUTES FOR BOARD OFFSITE PLANNING MEETING**

**HELD ON SEPTEMBER 7, 2007**

**At the Hilton El Conquistador Hotel, 10000 North Oracle Road, Tucson, AZ 85737**

#### ***Board Members***

William R. Martin III, M.D., Chair

Douglas D. Lee, M.D., Vice Chair

Dona Pardo, Ph.D., R.N., Secretary

Dan Eckstrom

Robert P. Goldfarb, M.D., F.A.C.S.

Patricia R. J. Griffen

Ram R. Krishna, M.D.

Todd A. Lefkowitz, M.D.

Lorraine L. Mackstaller, M.D.

Paul M. Petelin Sr., M.D.

Germaine Proulx

Amy J. Schneider, M.D., F.A.C.O.G.

#### **Call to Order**

The meeting was called to order at 9:00 a.m.

#### **Roll Call**

The following Board Members were present: Mr. Eckstrom, Dr. Goldfarb, Ms. Griffen, Dr. Krishna, Dr. Lee, Dr. Mackstaller, Dr. Martin, Dr. Pardo, Dr. Petelin, Ms. Proulx, and Dr. Schneider. The following Board Member was absent: Dr. Lefkowitz

#### **Call to the Public**

No one was present for Call to Public.

#### **Federation of State Medical Boards (FSMB)**

N. Stacy Lankford, M.D. and James N. Thompson, M.D. were present from the FSMB. Dr. Thompson addressed the Board and explained the FSMB's role in developing national health policy. Licensure and regulation policy is at the forefront of Boards throughout the country. Dr. Lankford discussed the United States Medical Licensing Examination (USMLE), which is the country's only pathway to licensure. The FSMB is conducting a comprehensive review of the USMLE and is exploring the possibility of gateway examinations after medical school and after training. This new design will allow medical schools to redesign their curriculum and have more flexibility. Dr. Thompson stated that the FSMB also offers a credentials verification service (FCVS) that became very valuable after Hurricane Katrina to verify physicians' core credentials. The FCVS will also become important when states move toward license portability. Dr. Thompson explained that the FSMB serves as a clearinghouse for reporting of state medical board disciplinary actions. He explained for the first time in history, discipline for unprofessional conduct has surpassed actions for substance abuse. The FSMB also uses the information reported by state medical boards to send out Disciplinary Action Reports and provide timely sharing of information between boards. Other services provided by the FSMB include: the International Association of Medical Regulatory Authorities to facilitate exchange of information among medical regulatory authorities; a National Clearinghouse on Internet Prescribing to investigate rogue Internet prescribing sites; a post-licensure assessment system to provide information for use in making decisions about a physician's ability to practice medicine safely; and an assessment center program to develop standardized and individual tools to assess physician competence. The FSMB has also been actively involved in policy development and has formed several work groups on emergency preparedness, a national clearinghouse on international medical schools, and professionalism. Dr. Thompson invited the Board to participate in its next annual meeting and upcoming seminars. The FSMB has also published a new book on responsible opioid prescribing instructing physicians on appropriate pain management and continually publishes other communications. The three goals for the FSMB in the next year include: continued competence of licensed physicians; increasing license portability; and leadership through collaboration. Additionally, the FSMB has developed a common license application form that has been adopted by a few states. Common licensure will facilitate interstate practice without state boards losing their source of funding.

Mr. Miller stated that one of the biggest problems with license portability is dealing with physicians with substance abuse and health issues affecting their practices. Every state's monitoring program for these physicians is different and states have differing opinions regarding how much information they will share about physicians participating in their programs. Dr. Lankford stated this is a definite problem as each state has differing standards for monitoring physicians with substance abuse issues. Dr. Martin further clarified that Board members do not know about physicians who are participating in the Board's monitoring program confidentially unless and until they relapse.

The Board discussed the common license application form. Dr. Thompson clarified that the form's questions are consistent with the bulk of questions asked by each medical board. Dr. Krishna asked about the requirements for graduate medical training prior to licensure. Dr. Thompson stated that the FSMB recommends states adopt a minimum of three years post graduate training. Dr. Lankford stated that many physicians will make it through one year of training without problems, but it is more difficult to pass a planned three year program.

Dr. Thompson asked whether the Board has had many complaints about medical spas. The Board noted in many of these facilities, the medical director is not on site and has little involvement in spa practices. Mr. Miller stated the Board needs to define the duties and responsibilities of the medical director. The Board has received complaints resulting from bad practices performed by non-licensed people in these facilities and the question is what responsibility the medical director bears.

Dr. Goldfarb stated that physician assistants are replacing residents in emergency department settings and are performing the majority of medical care. Dr. Thompson stated the challenge is to create a workforce large enough to supply qualified providers in emergency settings. Mr. Miller explained that primary care by mid-level providers has become a major issue and the Board is currently developing guidelines for physician assistant supervision.

Dr. Petelin stated that scope of practice has been another issue that affects patient safety. The Board has seen physicians practicing in specialties outside their training with harmful results to patients. The Board sees complaints for issues such as billing, but patients rarely complain that their physicians are inadequately trained. This is a concerning issue.

Finally, Dr. Martin stated the Board is developing its program for physicians with psychiatric and medical issues. The Board now has the statutory framework to create its program, but the Agency needs to further develop the mechanisms for getting physicians into the program.

#### **Presentation Status of Previous Offsite Meeting Projects**

Mr. Miller provided an update on projects assigned at last year's Offsite meeting. The Board created a Subcommittee on physician assistant (PA) supervision. The Subcommittee is in the process of developing guidelines on PA supervision and should be finished within the next month. The Agency has not moved forward with the future direction of its Physician Health Program and Mr. Miller stated the major hindrance from moving forward is its focus on which physicians need to participate. The Board needs to consider if the Program will address physicians with acute physical problems, physicians with disabilities that are manageable, or physicians who do not recognize their limitations and continue to practice with their limitations. The Board also needs to better communicate its programs and find methods to allow physicians who come forward to participate confidentially. Dr. Mackstaller stated there are a number of retired physicians in Arizona writing prescriptions, often without the proper indications. She asked if the Board has the authority to regulate these physicians. Ms. Cassetta stated that the Board does have authority to regulate the physician if the physician is licensed in this state and engaged in the practice of medicine. Dr. Mackstaller also stated that the Program needs to protect physicians who are also patients. Many physicians feel that if their personal psychiatric records were shared with the Board they would be less forthcoming in their therapy sessions. Mr. Miller stated that the Physician Health Program (PHP) statutes need to be rewritten to develop confidential monitoring. He also suggested the PHP be incorporated into MAP. Mr. Miller further suggested the Board open its program to other licensed healthcare professionals and hospitals. Mr. Miller stated there must be a formalized relationship between hospitals and the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) in order for hospitals to be able to use the Board's program. PHP should not be a public body, but it should have an oversight committee comprised of representation from different boards that does not operate under open meeting laws. This would require statutory change. Dr. Martin reminded the Board members that they previously agreed to limit the number of subcommittees it would develop in the upcoming year. He asked if this is the right time to develop a physician health subcommittee. Dr. Krishna stated that the time is now and agreed that the Board should cooperate with hospitals in the development of a program. Mr. Miller stated that Banner Hospital and the Arizona Hospital Association, as well as other groups, are willing to informally discuss the issue. Dr. Martin asked the Board for permission to discuss this idea with the Governor and develop a Subcommittee.

**Motion: Dr. Lee moved to develop a Subcommittee to develop the Physician Health Program.**

**Seconded: Dr. Krishna**

Dr. Goldfarb suggested that the Subcommittee meet and consider its options before presenting this issue to the Governor's Office. Dr. Krishna suggested involving groups like the Arizona Medical Association and the Arizona Hospital Association in the Subcommittee's meetings. Mr. Miller suggested that the first issue the Subcommittee address is participant confidentiality.

**Vote: 11-0**

Dr. Martin, Dr. Lee, Dr. Schneider and Dr. Petelin agreed to serve on the PHP Committee.

Mr. Miller stated that the time for conducting formal interviews and the issue of late submission of Board materials has improved over the last year. Dr. Martin asked the Board if they would like more prompting from the Chair when their 15 minutes from presenting cases has elapsed. Dr. Krishna stated that prompting often interrupts the thought process of the presenting Board member. The Board members expressed satisfaction with how formal interviews are currently progressing. Dr. Mackstaller felt it was important that physicians feel as though they are being heard. Mr. Eckstrom felt any prompting should be at the discretion of the Chair.

Mr. Miller stated that the agency is still in the process of implementing a new database and therefore, has not fully developed its on-line testing of statutes and rules. Mr. Miller stated there has been discussion about whether the test should be a requirement of licensure or as mandatory CME. Either option would require statutory change. Dr. Pardo asked when the test would be ready. Staff informed the Board that the test questions are available and the test should be available within a year. Dr. Pardo also asked if the Board could order a physician to take a statutory test as a condition of Probation. Ms. Cassetta stated that it could be required as part of Probation. She added that in order to make it a condition of licensure, statutory changes would be necessary, but to make it a mandatory CME only a rule change would be necessary. Dr. Goldfarb suggested the test be mandatory for initial licensure or license renewal. He did not think a physician should be awarded CME for taking the test.

**Motion: Dr. Goldfarb moved to make completing a test on the statutes governing the practice of medicine a requirement of initial licensure and licensure renewal.**

**Seconded: Dr. Lee**

The Board agreed the test should be educational in nature and therefore, the physician would only need to complete the examination and not pass it. The Board would like to go forward as soon as possible on this program.

**Vote: 11-0**

Mr. Miller updated the Board on the Board's previous request for him to send a letter to the Hospital's reminding them of their obligation to report physicians. Mr. Miller stated that last year, the Board asked him to send a letter to all the hospitals regarding their statutory obligation to report actions taken against physicians. Mr. Miller stated his letter was not received favorably among hospitals. The hospitals argued that this requirement interferes with their ability to perform peer review and they should only be required to report when they take an action against a physician's privileges. Mr. Miller stated that statute has two requirements, subsection (a) which requires the hospitals to report a physician when they have some information that may show a physician is incompetent and subsection (b) which requires hospitals to report physicians when the hospitals takes an action against the physician's privileges. He stated that the interpretation of subsection (a) requires hospitals to report as soon as they believe there is a problem, which could be before the peer review process begins. Mr. Miller stated that the purposes of the two subsections are different. He stated that a subsection (a) allows the Board to open an investigation and the subsection (b) reports requires to the Board to notify all the hospitals of the action against the privileges. He stated that the Board does open an investigation when it gets a subsection (b) report if it had not already opened an investigation. Ms. Cassetta stated that hospital representatives have been inconsistent in when they decide to report. For instance, hospitals often report allegations of substance abuse long before the peer review committee takes an action. Hospitals have also reported physicians who are not on their staff. Mr. Miller stated that there was a potential for the subsection (a) requirement to conflict with the peer review process. He stated that if prior to peer review the hospital does not make a subsection (a) report, then it is possible that during the peer review process the hospital will come into possession of material that may show the physician is incompetent and then the hospital would be required to report prior to the completion of the peer review process. Dr. Martin asked if the Board could send a letter to the Arizona Department of Health Services emphasizing the importance of taking serious actions against hospitals that fail to report physicians who may pose a threat to the public. Dr. Lee raised the issue of complaints raised against physicians that may or may not have any basis. He stated the burden falls on physicians to defend unfounded complaints. Dr. Pardo stated that physicians currently have to defend themselves against unfounded complaints with the Board and this is no different. Mr. Miller stated that he has informed hospitals that reports to the Board should be made based on information that is substantive and more than hearsay, policy or a concern. Dr. Goldfarb suggested changing the word "incompetent" in 32-1451(A) to make it more

clear when hospitals should report. Ms. Cassetta pointed out to the Board that subsection (a) requires reporting more than incompetence but it also requires reporting unprofessional conduct and unfitness. Mr. Miller also stated that another problem with the statute is that says "...any information that appears to show...." And that this is a low threshold for reporting.

Mr. Miller advised the Board to proceed with caution because mandatory reporting and peer review is a sensitive issue for the legislature. There is also a risk of the Board's proposed legislation being amended into something the Board did not want. Mr. Miller suggested developing a Substantive Policy Statement clarifying the Board's interpretation of this statute.

**Motion: Dr. Goldfarb moved to ask the Executive Director and Board Counsel to develop a Substantive Policy Statement regarding the Board's position on a hospital's duty to report and to instruct Staff, through the Executive Director, to refer hospitals who fail to report to the Arizona Department of Health Services.**

**Seconded: Dr. Krishna**

**Vote: 11-0**

Dr. Schneider asked Staff to include a question regarding the duty to report on the test required for licensure.

### **Physician Scope of Practice Issues**

Dr. Martin stated this has been an issue raised by the Board and by members of the Legislature. Mr. Miller stated that the Legislature was surprised that a physician's practice was unlimited. Mr. Miller informed the Board that this is consistent throughout the country and it is not feasible to license physicians by specialty as specialties evolve over time. This is not a problem until a physician's practice migrates drastically from his or her training. Nothing in statute specifically prohibits a physician trained in one field of practice to migrate into another field without proving his or her competency in that field to the Board. Dr. Lee clarified that this is not an issue in accredited facilities, but instead, among private practitioners. Dr. Schneider stated that Mutual Insurance Company of Arizona (MICA) now asks physicians to verify if they are providing services outside their specialty; however, MICA is not charged with the responsibility of ensuring physicians are practicing within their scope of practice. Dr. Goldfarb emphasized that for physicians practicing in another specialty from the one in which they trained, the Board needs to make clear that the physicians will be held to the same standard of care as physicians formally trained in that specialty. Mr. Miller stated the Board could take a formal position on this. Dr. Pardo asked if the Board verifies whether a physician has been trained in the area of interest he or she reports on the Board profile. Mr. Miller stated the Board does not verify area of interest, but does verify whether a physician is board certified. Mr. Miller stated that there is no current standard for validating whether the additional training a physician receives in a different specialty is adequate. Dr. Pardo suggested asking additional questions on the online renewal application to bring physicians a greater awareness of what they are doing. Dr. Schneider asked if the Board would consider requiring a physician performing office based surgery to also have privileges and credentials in a hospital. Dr. Lee stated this requirement was specifically dropped from the Office Based Surgery (OBS) Rules because it gave hospitals licensing authority. Dr. Schneider asked if a physician could request permission from the Board if he or she could not get hospital privileges. Dr. Goldfarb stated that the Board could establish that the standard of care for performing procedures using anesthesia requires that they be performed in accredited facilities. Dr. Petelin stated this would still not prevent unqualified people from performing procedures in unaccredited facilities.

Mr. Miller stated he informed the Legislature that scope of practice always needs to be evaluated from a quality of care perspective. Specifically, even if a physician has been adequately trained in a specialty, if a physician has not practiced certain areas of that specialty for a long period of time, then it would be below the standard of care to do it.

Dr. Krishna stated that the FSMB is looking into the scope of practice issue and felt the Board should form a Subcommittee to make recommendations based on the FSMB's decision. He felt it was important not to have a knee jerk reaction to the issue. Dr. Krishna suggested that this issue could be added to the FSMB Liaison Committee. Dr. Goldfarb suggested not waiting until the FSMB took a position and felt the Board should be more proactive in its approach.

**Motion: Dr. Goldfarb moved to create a Subcommittee to address physician scope of practice.**

**Seconded: Mr. Eckstrom**

**Vote: 11-0**

Dr. Krishna, Dr. Goldfarb, Dr. Schneider, Dr. Lee, Dr. Mackstaller and Ms. Proulx agreed to serve on this Subcommittee.

**Motion: Dr. Mackstaller moved to nominate Dr. Goldfarb as the Chair of the Physician Scope of Practice Subcommittee**

**Seconded: Dr. Lee**

**Vote: 11-0**

Mr. Miller discussed when it is appropriate to delegate tasks to unlicensed professionals and when it is appropriate to delegate responsibilities for those tasks. Dr. Krishna felt that a physician, regardless of whether he performs the procedure or delegates it to another licensed provider, is responsible for the procedure performed. Other Board members felt that there are times when a physician can delegate duties to licensed providers and also delegate the responsibility. Dr. Goldfarb stated that the Board has seen a number of explanations from physicians for operating on the wrong body parts. Even if the mistake was the fault of a nurse or a technician, the Board has found the physician responsible. However, there are examples when the physician must completely rely on other people, such as a physicist, to perform duties specific to that person. Dr. Goldfarb pointed to the memo written by Dr. Lefkowitz regarding co-management of ophthalmologic postoperative care and noted that the surgeon is always responsible for preoperative assessment and postoperative care regardless of the surgery performed. Dr. Lee felt physicians should be able to rely on the normal scope of practice in his or her particular field and should not always be held liable. Dr. Krishna stated that even though the physician may not be liable for a technician's actions, the physician should be held responsible. Dr. Mackstaller stated ophthalmologists before the Board have been using a standard of practice analysis instead of a standard of care analysis when defending their cases. She suggested consolidating Dr. Lefkowitz's memo and placing the Board's position on ophthalmologic care into guidelines for ophthalmologic care.

**Motion: Dr. Mackstaller moved to draft guidelines for preoperative and postoperative ophthalmologic care.**

**Seconded: Ms. Griffen**

**Vote: 10-1**

Dr. Martin suggested taking the comments Dr. Goldfarb made at a previous Board meeting regarding wrong site surgery and place those comments into a position statement from the Board.

**Motion: Dr. Goldfarb moved to instruct Staff to develop a position statement regarding wrong site/wrong level surgery and a physician's responsibility.**

**Seconded: Dr. Lee**

**Vote: 10-0-1**

#### **Subcommittee Updates:**

##### **Guideline Development Subcommittee**

Dr. Lee stated that the Subcommittee met and discussed the issue of physicians who use complementary or alternative medicine (CAM) in their practices. The Guideline developed by Staff and approved by the Subcommittee incorporates the position released by the FSMB.

**Motion: Dr. Goldfarb moved to accept the Subcommittee's Guidelines for Physicians Who Incorporate or Use Complimentary or Alternative Medicine In Their Practice.**

**Seconded: Ms. Proulx**

Additionally, Dr. Lee stated that the Auditor General has recently released its report on the Arizona Homeopathic Board and one of the suggestions is that the Arizona Medical Board license and regulate homeopaths. However, Dr. Lee did not concur with the recommendation that a homeopathic physician have a seat on the Arizona Medical Board. Mr. Miller stated that there is a possibility that the Arizona Homeopathic Board could be sunsetted. He informed the Board that the Auditor's reasons for maintaining the Homeopathic Board are weak and the board faces many obstacles due to a lack of size and funding. His recommendation is that the Board educate the Legislature that when patients see a homeopathic physician with the title MD(H), he or she cannot be expected to understand the distinction between an MD who is licensed by the Arizona Medical Board and an MD(H), not licensed by the Board. Dr. Goldfarb stated that one of the main arguments for keeping the Homeopathic Board was that it would affect the medical assistants who work for them. He stated this argument does not make sense and does not support keeping the board.

**Vote: 11-0**

Dr. Martin asked if the Arizona Medical Board can go on record stating it does not want a homeopathic physician having a seat on the Board. Mr. Miller stated he was clear on this issue with the Legislature before and would oppose it if proposed. Dr. Martin stated he did not believe the public is being served by the Homeopathic Board. Ms. Cassetta suggested stating that it is the Board's belief that physicians who have been revoked by the Arizona Medical Board are still practicing as homeopathic physicians and that this is not in the best interest of the public. Dr. Goldfarb stated that physicians must meet the standard of care for an allopathic physician regardless of whether that physician is also practicing CAM.

Dr. Martin thanked the Guideline Subcommittee members for their efforts. Dr. Lee stated the Subcommittee met its goals and had completed its work.

#### Liaison Committee to the FSMB

Dr. Krishna thanked the Subcommittee members for their participation and Staff for their help compiling information. Dr. Krishna stated that the Subcommittee looked at issues of out of state consultations, telemedicine practices, the common license application form proposed by the FSMB and the FCVS services. The Subcommittee feels as though the Board must be proactive on the portability of licenses and agreed with the concept of a common license application form and streamlined requirements for post graduate training among Arizona's neighboring states. Dr. Krishna also recommended a regional common license application among neighboring states, a separate telemedicine license and an out of state consultation license. Each state would maintain its fee structure. Dr. Krishna stated the next step is to act on these positions and work with the FSMB to make it happen. He asked the full Board to consider agreeing with this concept.

Dr. Krishna asked Staff to draft statutory language to develop a telemedicine license to allow physicians to use the telemedicine network and an out of state consultation license for physicians routinely performing consultations. Dr. Krishna stated that a telemedicine license would benefit out of state radiologists needed to read x-rays in Arizona. He did not see any downside to the concept because the physician would be regulated by the Board. Dr. Martin stated that a regional license may bring more licensed physicians to Arizona.

Dr. Krishna stated the Subcommittee will continue to meet to discuss the feasibility of these concepts.

#### Office Based Surgery Subcommittee

Dr. Martin reported that there will be an oral comment period on September 17, 2007. Mr. Miller stated that the Rules should be in place by December 4, 2007 if the Governor's Regulatory Review Council (GRRC) makes a finding of immediate effectiveness. The Board will need to be aggressive in getting the word out to the physician community that the Board will begin enforcing the OBS Rules on December 5. If GRRC does not make a finding of immediate effectiveness, the Board can expect the Rules to be effective on February 4, 2008. Dr. Martin reported that with these Rules, there is no need for the Subcommittee to continue.

#### Physician Assistant Supervision Subcommittee

Dr. Goldfarb stated that this Subcommittee developed out of last year's Board Offsite meeting and after the Board's position regarding physician assistant supervision was not received favorably throughout the community. Dr. Goldfarb stated there was a great deal of stakeholder involvement including emergency care providers, physician assistants and the Arizona Hospital and Healthcare Association. The PA Board also formed a Subcommittee on this issue and the two Subcommittees were able to harmonize their recommendations. Dr. Goldfarb reported that the PAs do not want as many restrictions as the Board requested and the proposed Guidelines strike a good balance between MDs and PAs. Dr. Goldfarb stated that supervising physicians (SPs) are responsible for the care provided by PAs, but there are times when responsibility can be yielded to the supervising physician agent (SPA). There is latitude with PAs practicing in emergency care settings. Dr. Goldfarb noted that a PAs ability to perform tasks depends on the SP. A PA may not perform tasks delegated by the SPA if the SP does not perform those tasks. Additionally, when a PA sees a patient, that patient automatically becomes a patient of the SP and the SP is legally liable. Dr. Lee clarified that in a group practice every physician can be the supervising physician for one PA as long as all are registered with the PA Board as supervising physicians. Each SP must have a weekly meeting with the PA to review charts and the care given and document that meeting. Appropriate supervision requires the SP review and discuss with the PA a number of factors based on the experience level of the PA, the duration of the working relationship, the practice environment, and as otherwise indicated by the standard of care. This discussion must be documented in the patient chart. Mr. Miller stated that despite the number of peculiar business relationships that are currently being developed, it is clear that the doctor patient relationship will not be interfered with. Finally, Dr. Goldfarb stated that the MD and PA must create a log of the cases reviewed.

These Guidelines will be brought to the October Board meeting for approval. Dr. Goldfarb stated that this document will conclude the Physician Assistant Supervision Subcommittee.

Dr. Krishna asked if the Board could publish in its next newsletter what the responsibilities are for physicians working as medical directors for Wal-Mart type practices. Mr. Miller suggested more discussion about this.

#### Selection of Executive Director Subcommittee

Dr. Martin stated that this Subcommittee has met once and is working in an expedited fashion to conduct the search for the new Executive Director.

#### **Physician/Hospital Duty to Report**

Mr. Miller reported that organizations have circumvented their duty to report by settling malpractice cases against the organization instead of against the individual physician. This is a loophole around the requirement to report under A.R.S. §32-1451(B). When the Board receives these reports, it must piece together which physicians were involved. The United States Department of Health and Human Services does not have a lot of regulatory teeth when it comes to the National

Practitioner Databank and therefore, the NPDB can admonish entities that fail to report, but they cannot do much in terms of discipline. The Board suggested Staff speak with representatives of facilities that are paying settlements on behalf of physicians in the name of the facility. Dr. Martin suggested writing a letter to the NPDB bringing the issue to their attention and asking for their opinion on this issue. He also suggested inquiring of the Florida and Minnesota Board how they handle this issue.

**Motion: Dr. Krishna moved to instruct the Executive Director and legal counsel develop a solution to close the loophole for circumventing the requirement to report physicians to the Board.**

**Seconded: Ms. Proulx**

**Vote: 11-0**

#### **Update on Attorney General Legal Affairs/Selection of Outside Counsel and Roles and Responsibilities of AGs**

Mr. Miller reported that the Attorney General's Office has contracted with two law firms, Mariscal Weeks and Kutak Rock, LLP. Mr. Miller expressed concern with Kutak Rock because they only have four attorneys. The Attorney General's (AG's) Office selected cases and priority levels for cases to be referred to these two firms that were consistent with the agency's preferences. Mr. Miller and Ms. Diehl will be meeting with representatives from these firms to educate them on the Board's processes and identify additional priority levels. Dr. Martin stated he has met with a representative from the AG's Office and has assurances that elimination of the backlog is their priority as well.

Dr. Krishna questioned the conflict of interest with an attorney with Mariscal Weeks who also represents physicians appearing before the Board. Mr. Miller stated that it has been made clear that this attorney must make sure he does not encounter a conflict of interest when representing the Board. Dr. Goldfarb asked about the status of AG Litigators and their progress for resolving cases at hearing. Dr. Martin stated that he has met with representatives from the AG's Office regarding their plans for transitioning Ms. Cassetta's position from the Solicitor General's Office to the Licensing Enforcement Section (LES). Dr. Martin asked the AG's Office place those plans on hold after Mr. Miller resigned as Executive Director so as not to lose staff with a great deal of institutional memory. Dr. Martin has also discussed the quality of representation before the Board and methods to improve it as cases mount. The AG's Office asked Mr. Miller to help bridge the transition to the new ED. Dr. Goldfarb asked if this means the Board can expect an increased pace of cases heard at formal hearing. Dr. Martin stated that he has spoken directly with the AG's office about this issue and the issue has evolved with time. Dr. Goldfarb stated that it is the perception among defense lawyers that there is confusion with the Board's litigation services and he is concerned that defense attorneys will circumvent the Board and move cases directly to hearing. Dr. Martin reassured the Board that this message has been bluntly conveyed to the AG's Office, along with case examples. Those case examples are currently under an expedited review at the AG's Office. Dr. Martin has also asked for an independent review of these cases and has been reassured that the Board's concerns are valid. Dr. Krishna stated that this is not a recent issue and the Board was previously in a position where it demanded additional competent help from the AG's office. However, this help has always been short lived. Dr. Martin stated one of the problems is that there is chaos in LES and there is not one person supervising the litigator work. Dr. Martin has asked to devote one attorney to ensure deadlines are met and cases progress expeditiously. This supervisory position might be able to come from the Solicitor General's Office. Dr. Goldfarb and Dr. Krishna expressed support of including a public member, such as Mr. Eckstrom, to participate in the discussions with the AG's Office. Dr. Mackstaller stated that the Board has worked hard to make fair and consistent decisions and it needs good legal support. She stated the Board needs assurances that the AG's Office takes this matter as seriously as the Board does. Board members expressed their support for Dr. Martin and the work he has done and continues to do with the AG's Office. Mr. Eckstrom agreed to work with Dr. Martin on this issue.

#### **Discussion on proposals and options to eliminate backlog of cases recommended for Revocation**

Mr. Miller stated that the Board took on the responsibility for the formal hearing case backlog with the AG's Office. Mr. Miller requested and received additional funding to eliminate the AG backlog. In return, he was asked to develop a solution to ensure this does not happen again. Mr. Miller stated that the Board needed one voice for legal advice and one attorney supervising the litigators. Additionally, Mr. Miller proposed that upon the Board's referral for Revocation, a physician's license should be suspended immediately. The physician would then have the opportunity to appear and petition the court to lift the suspension pending a formal hearing. Currently, physicians referred to formal hearing for Revocation are allowed to continue practicing while awaiting a hearing. Some cases are moving so slowly that physicians have no incentive to move the case forward. If the physician's license is suspended, there will be an impetus to take the case to hearing quickly. Ms. Cassetta stated there may be due process issues with this approach and it may not withstand judicial scrutiny. Mr. Miller stated that due process measures will need to be carefully written into the statute. Mr. Miller pointed to one example in which a physician has been practicing over 1,500 days since the Board sent him for Revocation. Mr. Miller explained that although the backlog of cases might not go down, the Board can assure the public that the backlog is safe.

**Motion: Dr. Lee moved that Staff develop a policy statement that the Board supports the proposed actions made by the Executive Director.**

**Seconded: Dr. Martin**

Dr. Goldfarb stated that he questioned whether the AG's office can fulfill the Board's needs at this time with litigators that are well trained and experienced. This may be an impossible request of the AG's Office and he was concerned with the potential outcome.

**Vote: 11-0**

**Immunity for Facilities that Conduct Evaluations Pursuant to Board Order**

Mr. Miller stated that contracted evaluators are immune from liability per statute. However, evaluating facilities do not have this same immunity. Mr. Miller asked the Board to give qualified immunity to all its evaluating facilities, allowing lawsuits only when these facilities act in bad faith. Facilities are reluctant to report all their findings because they are contacted by attorneys threatening legal action.

**Motion: Dr. Petelin moved to ask Staff to draft statutory language regarding qualified immunity for facilities.**

**Seconded: Dr. Krishna**

**Vote: 11-0**

The Board continued the Executive Director Exit Interview until its October meeting.

The meeting adjourned at 4:28 p.m.



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Timothy C. Miller, J.D., Executive Director